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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 104

MORRIS A. KENT, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICUS CURIAE

The sponsors of this brief are: Honorable Thurman Arnold, Garry Bellow, Esq., Elyce Zenoff Ferster, Esq., Steven P. Frankino, Esq., Robert Edward Goostree, Esq., Rufus King, Esq., Nicholas N. Kittrie, Esq., Dr. Verl Lewis, Vernon X. Miller, Esq., Sol Rubin, Esq., James E. Starrs, Esq., B. J. Tennery, Esq., and Arnold Trebach, Esq.

The sponsors of this brief do not speak for any organization. Their position is motivated however by an increasing public concern for the treatment of juvenile of-

fenders consistent with fundamental fairness and is further founded on a personal conviction that the legal foundation of juvenile court proceedings, as well as juvenile court accomplishments and record to date, require a careful review in light of our constitutional law precepts. The sponsors, especially because they support the juvenile court institution, believe that such review of proceedings and standards will aid, rather than weaken, the role of the juvenile court.

I. INTRODUCTION — The Significance of This Case

The importance of this case rests on the fact that it contains significant issues of Federal constitutional law about which there are many diverse opinions and holdings within the American judicial establishment. The central question posed is to what extent traditional constitutional guarantees apply to juvenile court proceedings.[1]

There are many issues involved in this case, but this brief does not discuss all of them, as does the main brief. This amicus brief has a limited objective: (1) *to urge the Court to decide that the grant of discretionary power to the juvenile courts to waive jurisdiction, when unaccompanied by reasonable and ascertainable standards, is contrary to the due process and equal protection requirements of the Fifth Amendment,* and (2) *to urge the Court to decide that the Sixth Amendment counsel guarantee applies to juvenile court and that there is a right to a hearing and counsel under the Fifth and Sixth Amendments in juvenile court proceedings where waiver is contemplated.*

The establishment of the juvenile courts was hailed by Dean Roscoe Pound as "one of the most significant ad-

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[1] This Court has never ruled on the question as to whether there is a right to counsel in juvenile court proceedings. While this case arose within a federal jurisdiction, the District of Columbia, it could have implications for state proceedings since this Court has given national application to the essential ingredients of the right to counsel guarantee in Gideon v. Wainwright, 372 U.S. 335 (1963).

vances in the administration of justice since the Magna Carta." Brought into the American judicial framework some fifty-five years ago, juvenile courts now exist and operate in every state.[2] It is estimated that more than one million cases pertaining to delinquent or neglected children are brought before these courts each year.[3]

It should also be noted preliminarily, for an appreciation of the significance of procedural matters in juvenile courts, that out of the more than three thousand juvenile court judges, one-fifth are not lawyers and more than half devote less than one-fourth of their time to juvenile and family matters.[4]

The Juvenile Court has been described as an "'informal' court, a 'private' court and a 'therapeutic' court. That is to say, the procedures of the court are marked by informality and something of the 'conference' as opposed to 'trial' atmosphere; its business is regarded as a confidential matter. . . ."[5] Since the view was prevalent, from the inception of juvenile courts, that juvenile proceedings are not criminal, it was thought unnecessary to apply to them the same substantive and procedural standards required in adult criminal proceedings.[6] Thus,

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[2] Tappan, Juvenile Delinquency, pp. 172-173 (1949); Skoler, *Juvenile Courts and Young Lawyers*, 10 The Student Lawyer J. 5 (1964).

[3] Juvenile Court Statistics - 1962, U.S. Children's Bureau Statistical Series No. 73 (1963).

[4] Biographical Data Survey of Juvenile Court Judges, George Washington University Center for Behavioral Sciences (monograph, 1964) at 10, 21.

[5] Skoler, note 1, at 5, 6.

[6] Sussman, Juvenile Delinquency, pp. 11-16 (1955); *Standard Juvenile Court Act*, Sec. 1 (1959). For a more detailed account of recent juvenile court standards in such areas as hearing, evidence and right to counsel see Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L.R. 547 (1957).

it is not clear if the right to a formal hearing and to counsel applies in juvenile court proceedings in American courts.

The unsettled state of the law as to the right to counsel in juvenile court is reflected by a quotation from a District of Columbia decision: "There is no unanimity of opinion among the various courts as to whether or not constitutional guarantees are applicable to juvenile offenders. The position is best stated in an annotation at 151 A.L.R. 1229: 'Such suggestions as may be gathered from cases discussing the general question of constitutional guarantees as applicable to juvenile offenders . . . in juvenile court proceedings, indicate unsettled and conflicting views,' and further the opinions of some courts 'respecting the constitutional issues presented, or which may, upon proper presentment, become directly involved, illustrates the existence of a sharp divergence of views as to the applicability of constitutional limitations to juvenile courts.'" *In re Poff.*[7]

The juvenile court standards in the District of Columbia, likewise, are not well defined. In the *Poff* case[8] the District Court held in 1955 that the Sixth Amendment counsel guarantee applied to a juvenile court proceeding in the District of Columbia. The following year, the United States Court of Appeals for the District of Columbia Circuit held in the *Shioutakon* case[9] that the D.C. Code required, by implication, the application of the right to counsel in juvenile court cases. The court did not see fit to "reach" the constitutional issues, but chose instead to dispose of the case purely on the basis of statutory interpretation.[10] The D.C. courts, furthermore, have not rec-

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[7] 135 F.Supp. 224, 226 (1955).

[8] 135 F.Supp. 224 (1955).

[9] Shioutakon v. District of Columbia, 236 F.2d 666 (1956).

[10] *Id.* at 669, n. 18.

ognized the right of a child, considered for waiver into district court, to a hearing of any kind preliminary to such waiver, as witness this case.[11]

Still, despite the unsettled status of juvenile courts, there has continued to be an awareness and recognition that the due process concept should place "some" constitutional limitations on how juvenile courts dispose of their business.[12] Indeed, the definition of these limitations has become of increasing interest and concern in recent years.[13] In part, this concern has been the product of a questioning attitude towards the true contents and effect of juvenile proceedings.

Referring to juvenile court proceedings as not criminal and therapeutic does not automatically resolve the question of constitutional guarantees, as long as a determination of delinquency carries with it a degree of social condemnation and deprivation of liberty. The United States Court of Appeals for the District of Columbia Circuit in a 1956 decision quoted a report on the functioning of the District's juvenile courts, pointing out that "the atmosphere of formality which surrounds the hearings [in the District] is equal to or greater than that in hearings in adult courts."[14] And the United States District Court for the District of Columbia has referred to a California decision which declared, "While the juvenile court law

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[11] See United States v. Stevenson, 170 F. Supp. 315 (1959), and Wilhite v. United States, 281 F.2d 642 (1960).

[12] Skoler, note 1, at 6. Rubin, *Protecting the Child in the Juvenile Court*, 43 J. Crim. L. and Crim. 425 (1952).

[13] Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547 (1957); Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387 (1961); Beemsterboer, *The Juvenile Court - Benevolence in the Star Chamber*, 50 J. Crim. L. & Crimin. 464 (1960).

[14] Shioutakon v. District of Columbia, *supra*, note 8, at 668, n. 10.

provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of a crime, nevertheless, for all practical purposes this is a legal fiction, presenting a challenge to credulity and doing violence to reason."[15]

The present case not only provides an opportunity for the necessary definition of constitutional standards in juvenile court but indeed demands it.

II. THE FACTS OF THE CASE

Petitioner Morris A. Kent, Jr., was a child aged sixteen at the time of his arrest in the instant case. He had previously been a probationer of the juvenile court and subject to its care for two years. He was arrested, in connection with the instant case, at about 3:00 p.m. on September 5, 1961. He was taken to police headquarters, instead of the juvenile court or the Receiving Home for Children, as required by law, and was kept there until 10:00 p.m. He was fingerprinted and interrogated by police officers acting in relays. He was again unremittingly interrogated by police officers the following day. On September 6, 1961, his mother retained counsel. Counsel filed an objection to the treatment of the child with the Juvenile Court and a motion requesting that Petitioner's Social Service file be made available to him in order that it could be evaluated and effective assistance of counsel be rendered. Counsel further moved the Juvenile Court for a hearing at which he could present his case against waiver of jurisdiction of the child to the adult court on capital charges. The Juvenile Court failed to pass upon the objection and motions. Furthermore, counsel was never afforded, during any part of the proceedings, either a formal or informal appearance before the court.

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[15] *In re* Poff, 135 F. Supp. 224, 226 (1955), quoting *In re* Contreras, 241 P.2d 631, 633 (1952).

On September 12, 1961, the Juvenile Court entered an order, without any opinion or statement of reasons, waiving the Court's jurisdiction over petitioner and ordering that he be held for criminal trial under the regular procedures by the United States District Court for the District of Columbia. This order was in pursuance of Title 11-914, D.C. Code and Policy Memorandum 7 of the Juvenile Court (issued November 30, 1959) which includes the criteria for such waivers.

Upon petitioner's trial in District Court, the confessions obtained from the child by the means described, though excluded from evidence, were the basis of hypothetical questions addressed to expert witnesses in rebuttal of petitioner's insanity defense. Likewise, fingerprints, secured under juvenile court auspices, were utilized to prove guilt in the district court.

III. THE ISSUES OF THE CASE

We believe that this case urgently presents the following questions:

1. Is Title 11-914, D.C. Code, which provides that the Juvenile Court have discretion in determining waiver of its jurisdiction over children of sixteen and older, without establishing any applicable standards, and without affording a hearing, unconstitutional because it permits arbitrary and unreasonable classifications contrary to the equal protection requirements of the Fifth Amendment to the Constitution of the United States and because it is a denial of due process guaranteed by the Fifth Amendment?

2. Is a child over sixteen denied his constitutional protection under the Fifth and Sixth Amendments when the Juvenile Court waives its jurisdiction and makes him accountable under the adult criminal law, without affording such child an opportunity to appear, with coursel, and to present his case against such waiver?

IV. ARGUMENT AND COMMENTS

Responding to the issues of this case, the sponsors of this brief wish to make the following comments:

Issue 1

The sponsors of this brief are especially concerned with the discretionary powers granted the juvenile court to waive jurisdiction under Title 11-914 of the D.C. Code. This grant of power by Congress specifies no standard or criteria whatsoever.[16] Such discretionary power tends to make the court subject to public pressure, in particular when the juvenile is charged with the commission of an especially offensive act. Oftentime, it is the most ill and disturbed children, who most require special treatment, that are released to the adult court.

A study conducted by the National Council on Crime and Delinquency[17] of the various criteria employed by the courts in determining whether jurisdiction over a juvenile should be waived, indicate many considerations which are in conflict with the juvenile court philosophy. Rejecting such criteria as the failure of previous juvenile court treatment, the hopelessness of the case or the uncooperative attitude of the juvenile, this study observes:

> "At first glance previous failure seems a reasonable ground for transfer, but it, too, is in conflict with juvenile court purposes and philosophy, since in effect it means that the court rejects any further attempt to treat the child. Such rejection implies either inadequacy of resources, for which the child is thus made to suffer, or a desire on the part of the court to avoid recording another failure . . . .

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[16] See, by comparison, the requirement of the Standard Juvenile Court Act that waiver be preceded by a finding that retention of jurisdiction by the juvenile court will be "contrary to the best interest of the child or the public."

[17] Transfer of Cases Between Juvenile and Criminal Court, A Policy Statement by the Advisory Council of Judges, *Crime and Delinquency*, January, 1962.

> "If the juvenile court feels powerless to help . . . is the criminal court in a better position? . . . It has been held that the juvenile court is not justified in transfering a case, no matter how serious, to the criminal court unless the child's own good and the best interests of the state cannot be obtained by retention of jurisdiction . . . (p. 6)
>
> "An illustration of transfer as punishment for a child's attitude came from a study in one state which found that 'three counties engaged in the questionable practice of remanding youth to the criminal court for trial when the youth denies the allegations of the petition. . . . The threat of certification to the criminal court is also used in some instances to prevent a youth from asserting his rights'." (p. 7)

This Court should determine whether Title 11-914 of the D.C. Code, as now formulated, does provide clear standards and guidelines in waiver decisions to guarantee against abuses of the requirements of "due process" and "equal protection" contained in the Fifth Amendment to the United States Constitution.

It has been held that the due process clause of the Fifth Amendment embodies a like concept of equal protection of the laws as applied to the states under the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1953). The passage of Title 11-914, D.C. Code, establishes the category of juvenile offender, which concededly rests upon a rational basis. Differential treatment of persons similarly circumstanced denies equality of protection of law, unless based on a classification which is reasonable and not arbitrary. *Goesaert v. Cleary*, 335 U.S. 464 (1948). However, the rupture of the classification of juvenile offenders by the exercise of waiver discretion by the Juvenile Court poses serious problems with regards to equal protection. No two juveniles involved in equal measure in the same offense are assured of equal treatment by the Court, since one may be retained within the privileged class and another put outside it, by a pure and simple discretionary act of the Court. It is apparent that persons similarly circumstanced may

be treated differently on an arbitrary and capricious basis, which is not subject to correction on review because the exercise of the Juvenile Court's discretion is not subject to review. Cf. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928); *Mutual Loan Co. v. Martell*, 222 U.S. 225 (1911); *Nicol v. Ames*, 173 U.S. 509 (1898).

Because Title 11-914 of the D.C. Code establishes no standards for waiver and requires no hearing and no record, the juvenile court discretion is exercised without possible judicial review. Conceding that wide discretion has traditionally been vested in courts, the sponsors of this brief contend that the fundamental requirements of fairness imposed by the Due Process clause of the Fifth Amendment on all government officers require the opportunity for judicial review in this instance. Without the right to review, there is no way in which the discretionary act can be examined for arbitrariness and capriciousness. While the right of appeal may not be an essential element of due process if due process has been accorded in the first instance, there is no means of determining the predicative due process in this type of juvenile proceeding without judicial review. Cf. *District of Columbia v. Clawans*, 300 U.S. 617 (1936). Since, "a fair trial in a fair tribunal is a basic requirement of due process," *Re Murchison*, 349 U.S. 133, 136 (1955), the right to test the fairness of the tribunal, the Juvenile Court, by review appears to be equally a basic requirement of due process under the circumstances of discretionary waiver of jurisdiction under the provisions of Title 11-914, D.C. Code.

Absent a statutory criterion for waiver, the elementary demands of due process require a hearing on the question of waiver and representation by counsel at waiver hearings. Otherwise, the Juvenile Court, in making the waiver decision, steps from its statutory role and becomes a prosecutor. Cf. *In re Groban*, 352 U.S. 330 (1957). Assuredly the juvenile is entitled to no less protection than the adult criminal, and it is fruitless to say that he will

have these when he is treated as an adult criminal, when the Juvenile Court has poisoned the wells against him by waiver of juvenile jursidiction.

Issue 2

It is the concern of the sponsors of this brief that the Petitioner in this case was unduly deprived of the right to a hearing and the right to appear with counsel at a critical stage of the proceedings, even though these proceedings are not designated as criminal. Even absent the question of transfer to the adult court, the sponsors believe that a determination of delinquency in the juvenile court carries with it a sufficient degree of social condemnation and deprivation of liberty to require the extension of the constitutional right to counsel to juvenile proceedings. It will not do to argue that presence of counsel will tend to lend unnecessary and excessive formality to the therapy-oriented non-criminal juvenile proceedings.[18] The sponsors of this brief believe, however, that the right to formal charges, formal hearing and formal counsel are inherent in our system of law and are the guaranties as well as the burdens of ordered liberty.[19]

The sponsors believe that a child in juvenile court is entitled to the protection available to a defendant in criminal court as well as the additional protections of the juvenile court. In other words, the juvenile court proceedings should not deprive the child of constitutional protections, they should add to them.

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[18] It will not do to merely keep pointing to the non-criminal appearance of the juvenile laws. ". . . the District's appellate courts . . . may be well advised to base their appraisals of these [juvenile] processes less on the theory of the Juvenile Court Act than on the practices of the authorities operating under or in conjunction with it." Note, *District of Columbia Juvenile Delinquency Proceedings*, 49 Georgetown L.J. 322, 357 (1961)

[19] Siler, The Need for Defense Counsel in the Juvenile Court, *Crime and Delinquency*, January, 1965.

We believe this Court has indicated its support of this concept in *Gallegos v. Colorado*, 370 U.S. 49 (1962). Also relevant is *Harling v. United States*, 295 F.2d 161 (1961).

The sponsors fully support the requirements of the Standard Juvenile Court Act (1959), published by the National Council on Crime and Delinquency, which provide: "As soon as practicable after the filing of a petition, and prior to the start of a hearing, the court shall inform the parents, guardian, or custodian, and the child when it is appropriate to do so, that they have a right to be represented by counsel at every stage of the proceeding. If any of them requests it but is found by the court to be financially unable to employ counsel, counsel shall be appointed by the court, and, if necessary, compensated out of funds in the court's budget. Upon a final adverse disposition if the parent or guardian is without counsel, the court shall inform them, and the child if it is appropriate to do so, of their right to appeal. . . ."

Moreover, this Court's assertion of the right to the assistance of counsel in state criminal cases involving non-capital offenses especially calls attention for the need to consider extending the right of counsel to a child in a juvenile court proceeding leading toward the waiver of jurisdiction of that child to an adult court on capital charges.[20] The act of transferring a case to the adult court is extremely important. It is not a simple ministerial function but involves the use of the power of judging at its highest level. The decision to transfer the case to an adult court may be the most severe "sentence" that the juvenile court may impose — because it places the child in a position to receive the harsher sanctions that may be handed down by an adult court. The phase of the case when the juvenile court judge is making the "full investigation" to determine whether or

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[20] Cf. Gideon v. Wainwright, 372 U.S. 335 (1963).

not to transfer the case is a "critical stage" of the proceeding, as that term has been applied in recent Supreme Court decisions. This stage is fully as critical as the arraignment in Alabama[21] or the preliminary examination in Maryland.[22] To deny a hearing at this state, with its concomitant denial of the right to counsel, is a violation of basic constitutional rights.[23]

The Oklahoma Criminal Court of Appeals, in discussing waiver of jurisdiction over juveniles, stated: "Certainly no graver concern can confront a juvenile court than that of certification of a child for prosecution for the crime of murder." (*In re Smith*, 326 P.2d 835, 1958). Because the decision of a juvenile court to waive jurisdiction is of such momentous significance for a child's future life, its exercise requires utmost care.

Section 11-914 of the D.C. Code provides that if a child over sixteen is charged with a felony, the judge may after full investigation waive jurisdiction and order the child to be held for trial in the regular adult criminal court. The D.C. District Court has held in *United States v. Stevenson*, 170 F. Supp. 315 (1959), that the statutory requirement of "full investigation" can be discharged by the judge on an ex parte basis and without an opportunity for the juvenile to be represented by counsel. See, also, *Wilhite v. United States*, 281 F.2d 642 (1960). The same result was reached in the instant case.

Even though the juvenile court proceedings are intended as a departure from the traditional criminal law procedures, fundamental fairness requires that a juve-

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[21] Hamilton v. Alabama, 368 U.S. 52 (1961).

[22] White v. Maryland, 373 U.S. 59 (1963).

[23] See, in connection with the waiver of jurisdiction, the important dissent of Judges Bazelon and Wright in Kent v. United States, 343 F.2d 247 at 264 (1964).

nile be afforded an opportunity to speak on the issue of waiver. In the instant case the juvenile court failed to allow for a hearing and relied instead upon the juvenile's social service file; to which counsel was denied access. It must be remembered that the accusatory system which relies upon a comprehensive background "dossier" prepared outside the reach of counsel's scrutiny and objections has never earned favor in our midst. Certainly it is improper under our system of law to have the fate of a young person determined, under a statute requiring "full investigation," without ever affording him an opportunity to be heard, to present his evidence, to examine the evidence in his social service file and to be represented by counsel in all these endeavors.[24]

Recognizing the importance, timeliness and broad national application of the questions presented by this case, the undersigned file this brief in the hope that this court's decision will establish the necessary standards of fairness for juvenile courts.

Respectfully submitted,

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October 25, 1965

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[24] The sponsors support and wish to call to the Court's attention the provisions of the Standard Juvenile Court Act which as a prerequisite for waiver requires a "full investigation and a hearing." (Section 13)

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